87-927

No. _____

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RUPERT RICHARDSON, ET AL.,
Appellants,

v.

EDWIN W. EDWARDS, ET AL.,
Appellees.

On Appeal From the United States District Court for the Middle District of Louisiana

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JURISDICTIONAL STATEMENT

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November 16, 1987

QUESTIONS PRESENTED

I. The first question to be decided in this matter is whether appellants are entitled to court costs and attorney fees upon a finding by a three-judge court that the defendants are in violation of section 5 pre-clearance requirements of the Voting Rights Act as amended at the time of filing of appellants' complaint.

II. The ultimate question presented is whether the district court erred in finding that a lump submission of the 1974 Louisiana Constitution without a specific reference to the change in voting procedure contained in Article 4 Section 20 satisfied the pre-clearance requirements of Section 5 of the 1965 Voting Rights Act as amended.

III. The threshold question presented is whether this Court should summarily reverse the decision below and remand the case to the district court with directions to develop a factual record adequate to serve as the basis for constitutional adjudication.

PARTIES

Appellants Rupert Richardson, Charles Jones, Herbert Baptiste, Sam Thomas, Zelma Wyche, Willie Hunter, Clifton LeMelle, Donis Hood, Kenneth Coates, G.G. Metoyer and Malcolm Jones, all residents of and domiciled in the State of Louisiana (plaintiffs below), appeal from the judgement entered by the United States District Court for the Middle District of Louisiana on September 18, 1987 that granted summary judgment for appellees Edwin W. Edwards, Governor of Louisiana; James H. Brown, Secretary of State; and William J. Guste, Attorney General for the State of Louisiana (defendants below) and dismissed appellants' action.

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No. _____

RUPERT RICHARDSON, ET AL., APPELLANTS

v.

EDWIN W. EDWARDS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

PARTIES

Appellants Rupert Richardson, Charles Jones, Herbert Baptiste, Sam Thomas, Zelma Wyche, Willie Hunter, Clifton LeMelle, Donis Hood, Kenneth Coates, G.G. Metoyer and Malcolm Jones, all residents of and domiciled in the State of Louisiana (plaintiffs below), appeal from the judgment entered by the United States District Court for the Middle District of Louisiana on September 18, 1987 that granted summary judgment for appellees Edwin W. Edwards, Governor of Louisiana; James H. Brown, Secretary of State; and William J. Guste, Attorney General for the State of

Louisiana (defendants below) and dismissed appellants' action.

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellants file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the three-judge federal court in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The September 17, 1987 opinion of the district court, which is not officially reported, appears as Appendix A to this Jurisdictional Statement.

JURISDICTION

This appeal arises from an action to enjoin the implementation of statutes changing the Louisiana Superintendent of Education Office from elective to appointive because said statutes and constitutional provision had either not been submitted or properly submitted to the U.S. Department of Justice for pre-clearance as per the requirements of Section 5 of the U.S. Voting Rights Act as amended. 42 U.S.C. 1973c. The judgment of the three-judge court (App. B, *infra*) granting appellees a motion for summary judgment was entered on September 18, 1987. A timely notice of appeal (App. C, *infra*) was filed on September 28, 1987. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Sections 1253 and 2284, which authorizes a direct appeal to this Court from a final judgment of a three-judge district court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifteenth Amendment to the United States Constitution provides in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

42 U.S.C. 1973c provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect *shall enact* or seek to administer any voting qualification or *prerequisite* to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, *...such State* or subdivision *may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification [etc.]... does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,* or in contravention of the guarantees set forth in section 1973b (f) (2) of this title, *and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualifications [etc.]... provided, that such qualifications [etc.]... may be enforced without such proceedings if the qualification [etc.] has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission,* or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered upon this section shall bar a subsequent action to enjoin enforcement of such qualification [etc.].... In the event that the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the

remainder of the sixty-day period which would otherwise require objection in accordance with this section. *Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.* [Emphasis added]

STATEMENT

1. This case involves the first question of whether appellants are entitled to attorney fees and court costs upon a finding by a three-judge court that the defendants are in violation of the Section 5 pre-clearance procedures of the Voting Rights Act (App. D, *infra*). Appellants, eleven black citizens and registered voters of the State of Louisiana, filed the instant action on June 11, 1987. They sought to invoke federal jurisdiction pursuant to 28 U.S.C. Sections 1331, 1343(3) and (4), and 42 U.S.C. Sections 1973, 1973a, 1973c, 1983 and 1988. They sought declaratory and injunctive relief against enforcement of certain amendments to the statutes and a constitutional provision establishing the Office of Louisiana Superintendent of Education which changed the method of selecting the Superintendent from elective to appointive.

2. Presently, the Louisiana Superintendent of Education is an appointive office, said appointment to be made by the Board of Elementary and Secondary Education. The Louisiana Legislature passed Act 444 of 1985 and Act 857 of 1985, which changed the method of selecting the Superintendent of Education from elective to appointive with Senate confirmation. These legislative enactments had not been pre-cleared at the filing of the complaint in this matter.

3. Appellants requested that a district court of three judges be convened to hear Section 5 Voting Rights issues raised by them. Particularly, plaintiffs alleged that the Louisiana Legislature enacted and implemented two amendments to the statute establishing the Louisiana Superintendent of Education changing the selection process from elective to

appointive without first obtaining pre-clearance.

4. The three-judge court entered a consent judgment (App. D, *infra*) on June 29, 1987, enjoining the enforcement of Acts 444 and 857 of 1985 for failure of the State of Louisiana in obtaining pre-clearance prior to implementation thereof, thus allowing the election for Superintendent of Education to proceed as if the statutes were not in force and effect.

5. Appellants also raised the ultimate question of whether Article 4 Section 20 of the 1974 Louisiana Constitution had been properly submitted to the U.S. Department of Justice for pre-clearance. This question is significant because said constitutional provision is the enabling law for Acts 444 and 857 of 1985. A consent judgment was approved by the court which reserved the sufficiency of pre-clearance issue pending a decision from the U.S. Department of Justice.

6. The three-judge district court entered orders on September 11 and 14, 1987, vacating and setting aside its consent judgment due to the pre-clearance of Acts 444 and 857 (App. E and F, *infra*). An evidentiary hearing was then fixed by the court to hear the remaining Section 5 issues.

7. The final court decision was silent on the issue of partial attorney fees although the court had found the defendants to have been in violation of 42 U.S.C. 1973c regarding Acts 444 and 857 of 1985.

8. Regarding the ultimate question of whether the enabling Louisiana constitutional provision (Article 4 Section 20) had been properly submitted to the U.S. Department of Justice for pre-clearance, the Court held that it was not prepared to say. However, the record will show that the State of Louisiana failed to produce any evidence to prove that it had made a proper and sufficient submission of Article 4 Section 20 of the 1974 Louisiana Constitution. In fact, the district court took a hands-off approach to this question, finding that it was a *res nova* issue. The question of whether a lump submission of voting changes in a State Constitution satisfies the Section 5

pre-clearance requirements has not been reviewed by any courts, including this Honorable Court.

9. It was clear from the testimony of one of the defendants' employees that the State of Louisiana through the Attorney General's Office only intended to file submissions of those articles of the constitution which were contained in the section pertaining to election laws. Article 4 Section 20 came under the executive branch section and there was no proof offered by the appellees to establish an intent to submit said section for pre-clearance.

THE QUESTION IS SUBSTANTIAL

The district court has declared that there were no issues of material facts to require a trial on the merits in granting defendants a judgment on their motion for summary judgment. The court erred in not concluding that appellants were entitled to attorney fees in connection with the consent judgment previously rendered in their favor (App. D, *infra*). *United States v. Cohan*, 358 F.Supp. 1217 (1973). The court further erred in not concluding that there was no evidence produced by the defendants to sustain their burden of proving that the change in voting procedure contained in Article 4 Section 20 of the 1974 Louisiana Constitution had been properly submitted to the U.S. Department of Justice for pre-clearance.

1. The primary purpose of enacting the Voting Rights Act was to enforce the right to vote as provided by the Fifteenth Amendment to the Constitution of the United States, which had become virtually a nullity due to myriad devices, schemes, and obstacles devised and used by States to prevent Black citizens from exercising the franchise in any manner whatsoever. To ensure the right to vote, the Voting Rights Act had to be drafted in such a manner as to address the initial obstacle confronting disenfranchised Black citizens — the

inability to get registered. To address this concern the Act suspended the use of literacy and other tests and devices where there was reason to believe that they had no legitimate purpose other than to, had been used to, and were being used to deny the right to vote on account of race or color.

In considering the language of the Act and amendments thereto, Congress has taken note of the many historic devices used to abridge and circumvent the rights afforded Blacks under the Fifteenth Amendment, such as poll taxes, grandfather clauses, white primaries, procedural hurdles to voting and running for office, racial gerrymandering, and discriminatory use of tests. In considering the many extensions and amendments to the Act, Congress has repeatedly noted the many ways resisters to the complete enfranchisement of Black voters, have maneuvered in order to avoid the guarantees of the Fifteenth Amendment and the implementation of the Voting Rights Act of 1965, as amended. Congress observed that following the dramatic rise in voter registration among Blacks and other minorities since the passage of the Voting Rights Act of 1964 and its amendments, such devices as a broad array of dilution schemes, making elective posts appointive, gerrymandering of election boundaries, instituting majority run-offs to prevent victories under a prior plurality system, substituting at-large elections for election by single-member districts, and the adoption of sophisticated rules were employed to cancel the impact of the new Black vote. Concluding that the common purpose and effect of such tactics have been to off-set the gains made at the ballot box under the Act, Congress has extended the coverage of the Act so that pre-clearance would apply to any change in the law which could even in subtle or indirect ways, infringe upon the right of minority citizens to vote and to have their vote to fully count.

In 1970, while considering extension of the provisions of the Act, Congress noted that there had been widespread ignoring

of the pre-clearance requirement.[1] Speaking through the Senate Judiciary Committee, it stated:

> If it had not been for Section 5 of the present Act, there is no telling to what extent the states and communities covered might have legislated and manipulated to continue their historical practice of excluding Negroes from the Southern political process.
>
> We also take note of the recent decision of the Supreme Court in *Allen v. Board of Elections*[2] in which the Court discussed the history of the enforcement of Section 5 and clarified its scope. The decision underscores the advantage of Section 5 procedures in placing the burden of proof on a covered jurisdiction to show that a new voting law or procedure does not have the purpose and will not have the effect of discriminating on the basis of race or color.[3]

Again in 1975, Congress, via a Senate Report, noted prior to continuing the pre-clearance requiremer . for jurisdictions originally covered in 1965:

> The recent objections entered by the Attorney General of the United States to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases, other measures may be restored to which would dilute increasing minority voting strength. Such other measures may incude switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans.[4]

Congress went on to extend the Voting Rights Act of 1965 for seven years so that previously covered jurisdictions would remain covered until August 6, 1982, and made *permanent* the nationwide ban on literacy tests and other devices, which had been temporarily *imposed* 2in 1970.

[1] Senate Report No. 97-417, June 18, 1982, p. 183.

[2] 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d (1969)

[3] 91st Cong. 2nd Sess., 115 Cong. Rec. S. 5521, March 2, 1970.

[4] Senate Committee on the Judiciary, Report on the Voting Rights Act Extension, S. 1279, S. Rept. 94-295, 94 Cong. 1st Sess. at 16-17 (1975).

Again in 1982 Congress, after reviewing years of schemes and tactics to circumvent the Voting Rights Act of 1965 and the rights it guaranteed, extended the Act, including the pre-clearance requirements, for twenty-five (25) years. In a Senate Report, Congress noted:

> The extent of objections under Section 5 has remained substantial. While some progress continues to be made, racial and language minority discrimination affecting the right to vote persists throughout the jurisdictions covered by the Section 5 preclearance requirement. All too often, the background of rejected submissions — the failure to choose unobjectionable alternatives, the absence of an innocent explanation for the proposed change, the departure from past practice as minority voting strength reaches new levels, and in some instances, direct indications of racial considerations — serves to underline the continuing need for Section 5.
>
> A review of the kinds of proposed changes that have been objected to by the Attorney General in recent years reveals the types of impediments that still face minority voters in the covered jurisdictions. Among the types of changes that have been objected to most frequently in the period from 1975-80 are annexations; to use of at-large elections, majority vote requirements, or numbered posts; and the redistricting of boundary lines.
>
> This reflects the fact that since the adoption of the Voting Rights Act, covered jurisdictions have substantially moved from direct, overt impediments to the right to vote to more sophisticated devices that dilute minority voting strength.[5]

The legislative background of the Act including Congress' adoption of the various judicial interpretations of the Act and the standards and procedures for pre-clearance adopted by the Attorney General and conclusive on the issues raised herein. See: *United States v. Board of Commissioners of Sheffield, Alabama, et. al.*, 435 U.S. 110, 55 L.Ed.2d 148, 98 S.Ct. 965 (1978).

2. As this Honorable Court has repeatedly declared, Section 5 focuses on *changes* in election practices that have

[5] Senate Report No. 97-417, June 18, 1972, p. 187.

occurred since November 1, 1964 in covered jurisdictions. *McCain v. Lybrand*, 465 U.S. 236, 251, 79 L.Ed.2d 271, 283 (1984). The courts' inquiry is "limited to whether the challenged alteration has the potential for discrimination." *NAACP v. Hampton County Election Commission*, 470 U.S. _____, 84 L.Ed.2d 124, 136 (1986). In cases challenging the sufficiency of pre-clearance, the courts should apply the *potential effects* test.

> It is not our province, nor that of the District Court below, to determine whether the changes at issue in this case in fact resulted in impairment of the right to vote, or whether they were intended to have that effect. That task is reserved by statute to the Attorney General or to the District Court for the District of Columbia. *NAACP v. Hampton County, supra.*

In defining the scope of Section 5, Congress explicitly required pre-clearance for "any change in the law, which could, even in subtle or indirect ways, infringe the right of minority citizens to vote and to have their vote fully count..." Senate Report No. 97-417, 97th Congress, 2nd Session 6-7 (1982) reprinted in U.S. Code Cong. & Admin. News 183 (1982). *Allen v. Board of Elections*, 393 U.S. 544, 569 (1969), *Perkins v. Matthews*, 400 U.S. 379 (1971). As the Supreme Court has found, the Department of Justice regulations also indicate that Section 5 covers a wide range of election practices and procedures. *Hampton County*, 84 L.Ed.2d at 1134-1356.[6] The Justice Department regulations (28 C.F.R. §51.12) suggest examples of changes that are relevant to this case; including:

> (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g. through redistricting..., changing to at-large elections from district elections);

[6] Any change affecting voting, even though it appears to be minor or indirect, even though it ostensibly expands voting rights, or even though it is designated to remove the elements that caused objection by the Attorney General to a prior submitted change, must meet the Section 5 preclearance requirement. 28 C.F.R. §51.11 (1984) cited in Id.

(f) Any change in the methods of determining the outcome of an election (e.g., by requiring a majority vote for election of the use of a designated past or post or place system).

Supreme Court doctrine has established that Section 5 should be interpreted broadly: "Our precedents recognize that to effectuate the congressional purpose, Section 5 is to be given broad scope." *Hampton County* at 841, Ed.2d 132. Thus, even seemingly minor changes, such as election and filing period dates, cannot be labelled "ministerial" and thereby avoid pre-clearance. In *McCain v. Lybrand*, 465 U.S. 236 (1984), the unanimous judgment of the court held that a 1971 change in the size of the county council not only required the Attorney General to determine whether the "change in the district boundaries or in the number of districts had a discriminatory purpose or effect," but also whether "the 1966 changes represented a setback for minority voters." *Id.* at 251-252.

The case law, Justice Department regulations, and legislative history thus strongly suggest that the challenged statutes and Article 4 Section 20 of the 1974 Louisiana Constitution fell within the coverage of Section 5.

3. Recent cases of this Honorable Court, especially *McCain v. Lybrand*, make it clear that submissions to the Attorney General must be made in an "unambiguous and recordable manner." 465 U.S. at 249. "[T]he purposes of this Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *United States v. Sheffield Board of Commissioners*, 435 U.S. 110, 136 (1978) *cited in Id.* Thus, a complete submission must include among other items (as provided under 28 C.F.R. 51.25):

j) a statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

l) a statement of the reasons for the change.

m) a statement of the anticipated effect of the change on members of racial or language minority groups.

o) a statement that the prior practice has been precleared... or is not subject to the preclearance requirement.

Practices that have been already enacted are not lawfully pre-cleared by subsequent submissions that may encompass election procedures, including the challenged practice. *McCain v. Lybrand*, 465 U.S. at 286-287.

In *McCain*, a lump submission in 1971 failed to pre-clear 1966 election changes since the Attorney General did not request nor receive adequate information to determine the impact of the 1966 changes. *Id.* The Supreme Court therefore overturned the District Court's factual finding that the submission sufficiently informed the Attorney General regarding the 1966 changes.

McCain implies that courts may inquire into the knowledge of the Attorney General: "[T]here is insufficient evidence for a finding that the Attorney General actually considered the changes made by the 1966 Act in preclearing the 1971 amendment," 465 U.S. at 254, when there is uncertainty regarding the sufficiency of the content of a pre-clearance submission, the courts should resolve the ambiguities against the submitting jurisdiction. *Id.* at 257.

The appellees argue that since Article 4 Section 20 was contained in the 1974 Constitution, it was a sufficient submission in accordance with the pre-clearance requirements. However, there were numerous articles contained in the 1974 Constitution which did not require submission, i.e., homestead exemptions, property rights, taxes, and other matters not relating to voting rights. Therefore, appellees' argument of a lump submission without reference to the specific change which is the subject of this litigation is exactly the kind of acts that Congress intended to guard against in extending the Voting Rights Act. While the specific question of a lump submission of a state constitution

has not been reviewed by this Honorable Court, the *McCain* case did address the issue of lump submissions of voting changes in holding that such were not sufficient.

Therefore, since the defendants failed to produce any evidence at the hearing of this matter to sustain their burden of proving that the changes contained in Article 4 Section 20 of the 1974 Constitution of Louisiana had been properly submitted to the U.S. Justice Department for pre-clearance containing the statutory requirements as outlined herein, this Honorable Court should find that the lump submission of the entire constitution was insufficient to inform the Attorney General regarding the specific changes made.

SPECIAL SHOWING WHERE APPEAL IS FROM FEDERAL DECREE GRANTING OR DENYING PRELIMINARY INJUNCTION

While recognizing the general principle that the action of a district court granting or denying a preliminary injunction will not be disturbed on appeal in the absence of a showing of abuse of discretion, the appellants submit that the present case involves abuse of discretion of a most clear and unmistakable nature. In this connection the appellants invite this Court's attention, in particular, to the following circumstances:

(1) In concluding that a lump submission of the entire 1974 Constitution was a proper and sufficient submission of the voting change contained in Article 4 Section 20, the district court squarely held that lump submissions of voting law changes are not in violation of 42 U.S.C. 1973c as amended in 1982. This holding is in direct conflict with the holding of this court which has ruled upon the lump submission question in other cases cited at page 12. So far as we have been able to ascertain, there is no other court which agrees with the court below on this matter; its ruling is unique as well as totally erroneous.

(2) The federal voting rights which the appellants are attempting to safeguard and vindicate in this action are important substantive rights which, as is shown by the legislative history which we refer to at page 6 above, Congress intended should be subject to a prompt and efffective remedy in the federal courts by way of injunction. The failure of the district court to afford such a remedy to the appellants frustrates the purpose of Congress and seriously prejudices the appellants.

(3) The preliminary showing already made in the court below discloses a factual situation clearly calling for the granting of prompt injunctive relief under the statute. Moreover, the appellees in the present action have not made any showing whatsoever that any of the additional evidence which they intend to offer at the final hearing would be evidence of such a nature as to make inapplicable the Act of Congress or to warrant the denial of injunctive relief.

(4) The preliminary showing made in the court below establishes that Article 4 Section 20 of the 1974 Louisiana Constitution was not properly submitted to the U.S. Department of Justice for pre-clearance in accordance with 42 U.S.C. 1973c as amended in 1982 and that it should not be enforced until such submission is made and pre-cleared.

(5) The grounds stated by the court below in its opinion granting a motion for summary judgment manifest a total lack of understanding by that court of the applicable principles of Section 5 of the Voting Rights Act.

(6) Where a covered jurisdiction seeks to enact and implement an unpre-cleared voting statute, courts have generally held that injunctions against enforcement of the statute are an appropriate remedy. *Lockhart v. United States*, 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983); *Huffman v. Bullock*, 528 F.Supp. 703 (M.D. Ala. 1981).

Under these circumstances the action of the court below in not granting appellants a preliminary injunction was an

arbitrary and unjust denial of the relief to which the appellants are plainly entitled, and involved a serious abuse of discretion which this court should promptly correct.

CONCLUSION

In light of the substantial, legitimate governmental and civil interests served y 42 U.S.C. 1973c, 1983 and 1988, this court should note probable jurisdiction to "review the exercise of the grave power of limiting the scope of an Act of Congress." *U.S. v. Gainey*, 380 U.S. 63,65 (1965).

For the reasons stated above, appellants submit that this appeal brings before the court substantial and important voting rights questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution, and that the questions present a national issue which has not been decided before.

November 16, 1987.

RESPECTFULLY SUBMITTED,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing document has this day been served upon all opposing counsel of record by personal delivery.

Baton Rouge, Louisiana, this 16th day of November, 1987.

Ernest L. Johnson

Ernest L. Johnson